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7
8 UNITED STATES DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 KIRBY SPENCER,

11 Plaintiff,

12 v.

13 MRS BPO, LLC, a foreign limited-liability
Company doing business in Nevada,

14 Defendant.
15

Case No. 2:14-cv-01833-MMD-GWF

16
17 **DEFENDANT MRS BPO, LLC's MEMORANDUM OF POINTS AND**
AUTHORITIES IN SUPPORT OF ITS MOTION FOR
18 **JUDGMENT ON THE PLEADINGS**

19 Defendant, MRS BPO, LLC ("MRS"), through undersigned counsel and pursuant to Federal
20 Rule of Civil Procedure 12(c), submits the following Memorandum of Points and Authorities in
21 support of its Motion for Judgment on the Pleadings to dismiss the Complaint filed by plaintiff, Kirby
22 Spencer ("Plaintiff") for failure to state a claim upon which relief can be granted.

23 **I. INTRODUCTION**

24 Plaintiff's Complaint does not meet the minimum pleading requirements established by Fed.
25 R. Civ. P. 8 and clarified by *Iqbal* and *Twombly*. Plaintiff conclusively alleges that MRS violated the
26 Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 by placing Automatic Telephone
27 Dialing System ("ATDS") calls to Plaintiff's cell phone without consent. Plaintiff's threadbare
28 allegations fail because they do not sufficiently allege a necessary element of the TCPA, namely that

1 MRS called Plaintiff via an ATDS. Plaintiff merely restates the TCPA's definition of an ATDS
 2 without providing any facts that could lead to the inference that MRS used an ATDS when calling
 3 Plaintiff. Indeed, the "call log" plaintiff attached to his complaint confirms that the calls went
 4 unanswered. Thus, plaintiff is taking a shot in the dark because he has no facts upon which to support
 5 his claim. **This omission is fatal** to Plaintiff's TCPA claim and this Court should dismiss Plaintiff's
 6 Complaint.

7 **II. BACKGROUND**

8 On November 4, 2014, Plaintiff filed a lawsuit against MRS. In pertinent part, Plaintiff alleges
 9 MRS violated the TCPA by placing robocalls to Plaintiff, i.e. "any call made using an automatic
 10 telephone dialing system . . . when there [was] neither (1) an established business relationship (see §
 11 227(a)(2) nor (2) prior express consent (see § 227(b)(1)(A))." Complaint, ¶ 11. Plaintiff, however,
 12 **does not allege any facts** relevant to an ATDS or artificial or prerecorded voice, nor could he. Plaintiff
 13 attached a call log of the four alleged calls which confirms that the calls went unanswered. See
 14 Complaint, Ex. 1. **This omission is fatal** to Plaintiff's TCPA claim and this Court should dismiss
 15 Plaintiff's Complaint.

16 **III. LAW AND ARGUMENT**

17 **A. Fed. R. Civ. P. 12(c) Standard**

18 "The legal standard for a motion for judgment on the pleadings is equivalent to a Rule 12(b)(6)
 19 motion to dismiss for failure to state a claim upon which relief can be granted." *Parlante v. Chase*
 20 *Home Fin., LLC*, 2010 WL 3271511, *1 (D. Nev. 2010).

21 To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient
 22 factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,
 23 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A
 24 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
 25 reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.
 26 Such factual content requires "more than labels and conclusions, and a formulaic recitation of the
 27 elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Plaintiff's complaint "must
 28

1 contain either direct or inferential allegations respecting all the material elements necessary to sustain
2 recovery under some viable legal theory.” *Id.* at 562.

3 **B. Plaintiff Failed To State A Claim Under The TCPA**

4 The TCPA prohibits certain telephonic communications made by, or directed to, individuals
5 within the United States. *See* 47 U.S.C. § 227(b)(1). In particular, the TCPA makes it illegal “to make
6 any call (other than a call made for emergency purposes or made with the prior express consent of the
7 called party) using any [ATDS] . . . to any telephone number assigned to a . . . cellular telephone
8 service[.]” 47 U.S.C. § 227(b)(1)(A)(iii). An ATDS is “equipment which has the capacity to store or
9 produce telephone numbers to be called, using a random or sequential number generator and to dial
10 such numbers.” 47 U.S.C. § 227(a)(1).

11 “Use of an automatic telephone dialing system is a necessary element of a claim under the
12 TCPA, so dismissal is required in the absence of a **plausible inference** that Defendant used such a
13 system.” *McGinity v. Tracfone Wireless, Inc.*, 2014 WL 1202950, *3 (M.D. Fla. 2014) (emphasis
14 added). “As the courts have recognized, to satisfy the *Twombly/Iqbal* standard with respect to such a
15 TCPA claim, a plaintiff must plead . . . circumstances that would support the inference that these calls
16 were placed with [an] automatic telephone dialing system or an artificial or prerecorded voice.”
17 *Wallack v. Mercantile Adjustments Bureau, Inc.*, 2014 WL 1515852, *2 (E.D. Mich. 2014; *Hanley v.*
18 *Green Tree Servicing, LLC*, 934 F. Supp. 2d 977, 982 (N.D. Ill. 2013). “Plaintiffs need not plead
19 ‘specific technical details’ regarding [the defendant’s] use of an ATDS, but they must at least describe,
20 in laymen’s terms, the facts about the calls or the circumstances surrounding the calls that make it
21 plausible that they were made using an ATDS.” *Baranski v. NCO Fin. Sys., Inc.*, 2014 WL 1155304,
22 *6 (E.D. N.Y. 2014) (internal citation omitted). *See also Jones v. FMA Alliance Ltd.*, 978 F. Supp. 2d
23 84, 85, 2013 WL 5719515, *1 (D. Mass. 2013); *Gragg v. Orange Cab Co., Inc.*, 942 F. Supp. 2d 1111,
24 1113–14 (W.D. Wash. 2013); *Johansen v. Vivant, Inc.*, 2012 WL 6590551, *3 (N.D. Ill. 2012).

25 The Court should dismiss Plaintiff’s Complaint for failure to state a claim upon which relief
26 can be granted. Plaintiff attempts to state a TCPA claim by alleging that he received “robocalls” and
27 then defining robocalls as calls using an ATDS. Complaint, ¶ 11. Plaintiff does **not** allege **any** facts
28 about the calls that make it plausible they were made using an ATDS, **nor could he, as he never**

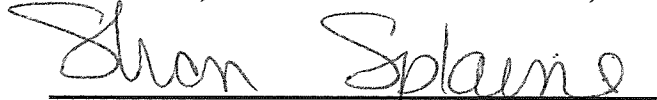
1 answered any of the calls. See Complaint, Ex. 1. Plaintiff merely states legal conclusions, which
2 fails the *Twombly/Iqbal* standard. Plaintiff's TCPA claim, therefore, fails as a matter of law.

3 **III. CONCLUSION**

4 The Court should dismiss Plaintiff's Complaint and grant MRS any other relief that the Court
5 deems appropriate.

6 DATED this 10 day of March, 2015.

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8 

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15 **CERTIFICATE OF SERVICE**

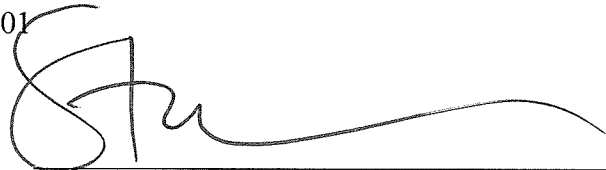
16 I certify that on this 10th day of March, 2015, a copy of the foregoing was filed electronically
17 in the ECF system. Notice of this filing will be sent to the parties of record by operation of the Court's
18 electronic filing system, including Plaintiff's counsel as described below. Parties may access this
19 filing through the Court's system.

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